Chairman HATCH. Let me turn to the Ranking Member for his remarks.

[The prepared statement of Chairman Hatch appears as a submission for the record.]

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. I think it was a wise thing to do. As I said, when I walked by there, there appeared to be plenty of room. I am wondering, Mr. Chairman, I am wondering if we are going to be moving down there anyway, and Senator Warner and Senator Hutchinson, I would just as soon withhold my statement until we go down there, as a courtesy to Senator Warner and Senator Hutchison, and if Senator Voinovich comes, if they want to give their statement here, and then I will give my opening statement down there.

Chairman HATCH. I would prefer for you to give your opening statement, and then we will hear from the two Senators.

Senator LEAHY. Happy to do that, Mr. Chairman. I tried.

Chairman HATCH. I think my colleagues understand.

Senator LEAHY. I know they are anxious to hear my statement anyway.

Chairman HATCH. Well, I am certainly anxious to hear it.

Senator LEAHY. Following the Chairman's example, it will be a little bit lengthy.

We meet in an extraordinary session to consider six important nominees for lifetime appointments to the Federal Bench. During the last 4 years of the Clinton administration this Committee refused to hold hearings and Committee votes on qualified nominees to the D.C. Circuit and the Sixth Circuit. Today, in very sharp contrast, the Committee is being required to proceed on three controversial nominations to those same circuit courts and do it simultaneously. Many see this as part of a concerted and partisan effort to pack the courts and tilt them sharply out of balance.

In contrast to the President's Circuit Court nominees, the District Court nominees to vacancies in California, Texas and Ohio, seem to be more moderate and bipartisan. Today we will hear from Judge Otero, nominated to the U.S. District Court for the Central District of California, unanimously approved by California's bipartisan Judicial Advisory Committee, established through an agreement between Senator Feinstein and Senator Boxer with the White House. I wish the White House would proceed to nominate another qualified consensus nominee like Judge Otero for the remaining vacancy in California. Too often in the last 2 years we have seen the recommendations of such bipartisan panels rejected or stalled at the White House. I note that Judge Otero's contributed to the community, worked on a pro bono project for the Mexican Legal Defense and Education Fund, served as a member of the Mexican Bar Association, the Stanford Chicano Alumni Association and the California Latino Judges Association, among others.

We will hear from Robert Junell, nominated to the U.S. District Court for the Western District of Texas, another consensus nominee who has a varied career as litigator and member of the Texas House of Representatives, life member of the NAACP, and a former

member of the board of directors of La Esperanza clinic. I spoke earlier with Representative Charlie Stenholm, who strongly supports him.

And then of course, Judge Adams, nominated to the U.S. District Court for the Northern District of Ohio.

These are not the ones who create the controversy, and I am disappointed the Chairman has unilaterally chosen to pack so many Circuit Court nominees onto the docket of a single hearing. This is certainly unprecedented in his earlier tenure as Chairman, and it is simply no way to consider the controversial and divisive nominations in a single hearing. It is not the way to discharge our constitutional duty to advise and consent to the President's nominees.

When I was Chairman over 17 months we reformed the process of judicial nomination hearings. We made tangible progress repairing the damage done to the process in the previous 6 years. We showed how nominations of a Republican President could be considered twice as quickly in a Democratic controlled Senate as a Republican controlled Senate considered President Clinton's nominees. We added new accountability by making the positions of home-state Senators public for the first time, and we did away with the previous Republican process of anonymous holds.

We made significant progress in helping to fill judgeships in the last Congress. The number of vacancies was slashed from 110 to 59, despite an additional 50 new vacancies that arose during that time. Chairman Hatch had written in September 1997 that 103 vacancies—this was during the Clinton administration—did not constitute a vacancy crisis. He also stated his position on numerous occasions that 67 vacancies meant full employment on the Federal court. Even with the two additional vacancies that have arisen since the beginning of the year, there are now 61 vacancies on the District and Circuit Courts. Under a Democratic controlled Senate we went well below the level that Chairman Hatch used to consider acceptable, and the Federal Courts have more judges now than when Chairman Hatch proclaimed them in full employment.

We made the extraordinary progress we did by holding hearings on consensus nominees with widespread support and moving them quickly, but by also recognizing that this President's more divisive judicial nominees would take time. We urge the White House to consult in a bipartisan way and to keep the courts out of politics and partisan ideology. We urged the President to be a uniter, not a divider, when it came to our Federal Courts. We were rebuffed on that. All Americans need to be able to have confidence in the courts and judges, and they need to maintain the independence necessary to rule fairly on the laws and rights of the American people to be free from discrimination, to have our environmental consumer protection laws upheld.

Under Democratic leadership in the Senate we confirmed 100 of President Bush's nominees within 17 months. Two others were rejected by a majority vote of this committee. Several others were controversial. They had a number of negative votes, but they were confirmed. And given all the competing responsibilities of the Committee and the Senate in these times of great challenges to our Nation, especially after the attacks of September 11th, then later the anthrax attacks directed at Senator Daschle and myself, attacks

that killed several people and disrupted the operations of the Senate itself, hearings for 103 judicial nominees, voting on 102, and favorably reporting 100 in 17 months is a record we can be proud of, and one that I would challenge anybody to show, certainly in recent years to be matched. During the 107th Congress the Committee voted 102 of 103 judicial nominees eligible for votes. That is 99 percent. Of those voted upon, 98 percent were reported favorably to the Senate. Of those, 100 percent were confirmed. Incidentally, we completed hearings of 94 percent of the judges that had their files completed.

Now, this 103 judges heard in 17 months is contrast to the less than 40 a year that the Republicans had when they had President Clinton as President. Indeed, they failed to proceed on 79 of President Clinton's judicial nominees in the 2-year Congress in which they were nominated. More than 50 of them were never even given a hearing. Indeed, the Senate confirmed more judicial nominees in our 17 months than the Republican controlled Senate did during 30 months. More achieved in half the time, but achieved responsibly.

We showed how steady progress could be made without sacrificing fairness. But in contrast, this hearing today portends real dangers to the process and to the results, all to the detriments of our courts and to the protections they are intended to afford to the American people. The Senate, in this instance, and the Congress in many others, is supposed to act as a check on the Executive and add balance to the process. Proceeding as the majority has unilaterally chosen today is unprecedented. It is wrong. It undercuts the ability of this Committee and the Senate to provide balance. Three controversial Circuit nominations of a Republican President for a single hearing. That is something the Chairman, current Chairman, something he never did for the moderate and relatively noncontroversial nominees of a Democratic President just a few years ago. One has to think it is a headlong effort to pack the courts, and notwithstanding our efforts not to carry out the same instruction as we saw with a Democratic President, we seem to be going back to different rules for different Presidents.

Jeffrey Sutton's nomination has generated significant controversy and opposition. I have questions about his efforts to challenge and weaken among other laws the Americans with Disabilities Act, the Age Discrimination Employment Act, the Violence Against Women Act, and his perceived general antipathy to Federal protection for state workers. I am concerned that more than 500 disability rights groups, civil rights groups, and women's groups are opposed to his confirmation because they feel. he will act against their interests and not protect their rights. I am concerned about a reputation among observers of the legal community that he is a leading advocate for the states' rights revival. This is a nomination that deserves serious scrutiny and which ought to be considered has been the practice for decades in this Committee as the only circuit court nominee in this hearing. The process imposed by my friends on the other side of the aisle is cheating the American people of the scrutiny these nominees should be accorded.

We are also being asked to simultaneously consider the nomination of Deborah Cook. She is one of the most active dissenters on the Ohio Supreme Court. She comes to the Committee with a judi-

cial record deserving of some scrutiny, and it has also generated a good deal of controversy and opposition as well.

I note that these two difficult nominations are both in judgeships on the Sixth Circuit Court of Appeals. Now, that was a court to which President Clinton had a much harder time getting his nominees considered.

Republicans fail to acknowledge that most of the vacancies that have plagued the Sixth Circuit arose during the Clinton administration, when President Clinton had nominated people to the Court, and they were never even given a hearing. The Republicans closed the gates. They refused to consider any of the three highly qualified, moderate nominees President Clinton sent to the Senate for those vacancies. Not one of the Clinton nominees to those current vacancies on the Sixth Circuit received a hearing by the Judiciary Committee under Republican leadership from 1997 through June 2001.

Now, in spite of that history, when the Democrats took over, we gave Committee consideration, and we confirmed two of President Bush's conservative nominees to that court last year. We did not play tit for tat. With the confirmations of Judge Julia Smith Gibbons of Tennessee, Professor John Marshall Rogers of Kentucky, Democrats confirmed the only two new judges to the Sixth Circuit in the past 5 years.

Regrettably, despite our best efforts, the White House rejected all suggestions to address the legitimate concerns of Senators in that circuit that qualified, moderate nominees were blocked by Republicans when they were in charge.

The Republican majority refused to hold hearings on the nomination of Judge Helen White, Kathleen McCree Lewis, Professor Kent Markus. One of those seats has been vacant since 1995, the first term of President Clinton.

Judge Helene White of the Michigan Court of Appeals was nominated in January 1997. She did not receive a hearing on her nomination during the more than 1,500 days her nomination was before this committee, which probably set a record—4 years—51 months, in fact, no hearing. She was one of 79 Clinton judicial nominees who did not get a hearing during the Congress in which she was first nominated, and she was denied a hearing after being renominated a number of times, including in January 2001.

Actually, the committee, under Republican control, had only about eight Courts of Appeals nominees a year that they heard. In 2000, they only held five, which contrasted today, with a Republican president, they will hold three in 1 day.

We have Kathleen McCree Lewis, a distinguished African–American lawyer from a prestigious Michigan law firm was never accorded a hearing on her 1990 nomination to the Sixth Circuit, and that nomination was finally withdrawn by President Bush.

Professor Kent Marcus, another outstanding nominee to a vacancy in the Sixth Circuit, never received a hearing on his nomination. And while his nomination was pending, his confirmation was supported by individuals of every political stripe, including 14 past presidents of the Ohio State Bar Association, and more than 80 professors and groups like the National District Attorneys' Association and virtually every newspaper in the State.

Now, Professor Marcus did say in testimony at another hearing how what happened to him, here are some of the things he said:

"On February 9, 2000, I was the President's first judicial nominee in that calendar year. And then the waiting began."

"At the time my nomination was pending, despite lower vacancy rates in the Sixth Circuit, in calendar year 2000, the Senate confirmed circuit nominees to the Third, Ninth and Federal Circuits." No Sixth Circuit nominee was given a hearing.

". . .more vacancies on the way, why then did my nomination expire without even a hearing?"

And then, to quote him, "To their credit, Senator DeWine and his staff and Senator Hatch's staff and others close to him were straight with me."

"Over and over again they told me two things: There will be no more confirmations to the Sixth Circuit during the Clinton Administration. This has nothing to do with you, personally. It doesn't matter who the nominee is, what credentials they may have or what support they may have, they're not going to be heard."

As Professor Markus identified, some on the other side of the aisle held these seats open for years for a Republican President to fill, instead of proceeding fairly. That is why there are now so many vacancies on the Sixth Circuit. Had Republicans not blocked President Clinton's nominees to the Sixth Circuit, if the three Democratic nominees had been confirmed and President Bush appointed the other vacancies on the Sixth Circuit, that court would be almost evenly balanced between judges appointed by Republican and Democratic Presidents, and that is why the Republicans blocked it. They do not want balance, and the same is true of a number of other circuits.

The former Chief Judge of the Sixth Circuit, Judge Gilbert Merritt, wrote to the Judiciary Committee Chairman years ago to ask the nominees get hearings. He predicted by the time the next President is inaugurated, there will be six vacancies on the Court of Appeals. Almost half the court will be vacant.

But no Sixth Circuit hearings were held in the last three/4 years of the Clinton administration, almost the entire second presidential term, despite these pleas. And when I scheduled the April 2001 hearing on President Bush's nomination of Judge Gibbons to the Sixth Circuit, it was the first hearing on a Sixth Circuit nomination in almost 5 years, even though there had been three pending for President Clinton that never got heard, and we confirmed Judge Gibson by a vote of 95 to nothing.

But we did not stop there. We proceeded to hold this hearing on a second Sixth Circuit nominee just a few short months later—Professor Rogers. He, too, was confirmed.

This is very similar to what had happened in the Circuit of Appeals for the District of Columbia, the Nation's circuit. It plays a significant role in environmental areas, OSHA, the National Labor Relations Board. There, again, President Clinton's nominees were not allowed to be heard, although we did hold a hearing for one of President Bush's last year.

Allen Snyder was a law partner of Mr. Roberts and a former clerk to Chief Justice Rehnquist. He was never allowed a Committee vote. The Republicans refused to give Professor Elena

Kagan, another D.C. Circuit nominee, a hearing during the 18 months she was pending.

Today's nominees to the D.C. Circuit, John Roberts, worked in the Reagan Justice Department, in the Reagan White House, was an associate of former Solicitor General Kenneth Starr. It is obvious the Bush administration feels far more comfortable with him.

Also, home–State Senators I understand have not been consulted in these. We have certainly not received any "blue slips" back. What we are doing is we are appointing people to the highest courts in the land, with little more attention and scrutiny than we would pay to appoint these for a temporary Federal commission. It is a disservice to the American people.

The American people can be excused for sensing that there is the smell of an ink pad in the air, rubber stamps already out of the drawer.

Thank you, Mr. Chairman.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Chairman HATCH. Thank you, Senator Leahy.

[Applause.]

Chairman HATCH. We will have order in the room.

We will turn to—yes, sir?

Senator SCHUMER. I know we do not have opening statements, and I do not want to get into any of the substance here, but I would ask that a letter that a number of us signed to you be added to the record.

Chairman HATCH. We will put both your letter—

Senator SCHUMER. And I would just make this point. We received notice of who the witnesses would be at 4:45 yesterday. That does not give anyone any chance to prepare. The Committee has not organized. We do not have rules. You are changing the rule of the tradition of the "blue slip," but we do not know what it is. This is just being rushed beyond, aside from the fact which Senator Leahy dealt with, in terms of the three nominees, now we have received notice for a hearing next Tuesday. We do not know who is going to be on the hearing, and there is a rule in the Committee of a one-week notice.

And so there is just a tremendous rush to judgment here that is just not fair. We know we have differences on these nominees, but all of the procedures seem to be being ripped up in an effort to rush things through, and I would just ask that you give the letter that we sent you some consideration.

It is not fair to tell us at 4:45 last night as to who the witnesses were going to be. On important judges like this, it is important that we get a chance to prepare, and I would just urge that in the future, this policy—or whatever it is—be reexamined. We have no chance, no chance to adequately prepare. If the impression that Senator Leahy said that we are just trying to rush things through without thorough examination is rankling some people, it is no wonder, because of all of these things. It is just not right for us.

And I would ask you really give consideration to the letter, as you were generous enough to move the room as well, because we are going to have an awful time over the next year if we are not going to get an adequate chance to prepare to ask questions fully,